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No. 90-762

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS AND SHARON FREYTAG, JOE AND GLADYS WOMBLE, BERT AND MILDRED TIMM, KENNETH AND CANDACE McCOIN,

*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

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The government's brief in opposition does not challenge the merits of the Appointments Clause question petitioners have presented. Instead, the brief in opposition adds a new question: whether Appointments Clause objections are waivable. The government contends that Appointments Clause objections — unlike all other structural objections to violations of the separation of powers — are fully waivable, and that waiver of those

objections below precludes this Court's review. See Brief in Opposition ("Opp.Br.") at 13-14.[1]

The government is wrong. Petitioners regard the nonwaivability of Appointments Clause objections as settled by this Court's earlier decisions, most importantly, *CFTC* v. *Schor*, 478 U.S. 833, 850-51 (1986); *Glidden* v. *Zdanok*, 370 U.S. 530, 535-37 (1962); and *Lamar* v. *United States*, 241 U.S. 103, 117-18 (1916). See Pet. 24-26. Each of these cases held that a party's failure to raise a structural separation-of-powers objection below did *not* preclude review on the merits of that constitutional issue by this Court. In the face of this authority, the government offers three arguments for treating Appointments Clause claims as nonetheless fully waivable. Each lacks merit and warrants only brief reply.[2]

[1] In answer to petitioners' statutory argument that the special trial judge below was allowed effectively to *make* the decision of the Tax Court in this case in violation of congressional authority, Petition for Certiorari ("Pet.") at 8-12, the government seeks to deny that the Tax Court's Chief Judge rubber-stamped the special trial judge's report the same day it was received. (Opp.Br. 6 n.5; 7 n.6). The government bases this response on the fanciful speculation (made without record support) that Chief Judge Sterrett had somehow sneaked a peek at the special trial judge's report and the staggering record and given them serious study before the case had even been reassigned to the Tax Court. (GB 6 n.5). The government thus asks this Court to presume regularity in these proceedings, *id.*, while suggesting that the statutorily mandated Tax Court review was in fact conducted in a most irregular manner.

The government's speculation is belied by Tax Court Rule 183, which makes plain that, as one would expect, a special trial judge's report is reviewed only after the case has returned to the Tax Court and been assigned to a particular Tax Court judge. (A91-92). Even the court below admitted what the docket entries confirm — that the Chief Judge adopted the report the very same day it was filed. (A8). *See also* Tax Court Docket Entries for No. 3749-84, Oct. 21, 1987. Since the government cannot bring itself to argue that this reflexive rubber-stamp constitutes meaningful review, the linchpin of its argument on § 7443A(b)(4) disintegrates.

[2] The government also argues at the outset that "petitioners' fact-bound contention that their consent was '[ ]coerced' . . . has a singularly insincere ring in a case, such as this one, where the relief petitioners seek is precisely the retrial they claim '[ ]coerced' their consent to begin with." (Opp.Br. 14) (brackets in original). But there is no reason for the government to take such offense. As Judge (now Justice) Kennedy explained in *Pacemaker Diagnostic Clinic* v. *Instromedix*, 725 F.2d 537, 543 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984), discussed in the Petition at 27-28, a party who consents to trial before a magistrate, when the alternative is delay or other procedural hardships attendant to trial in an Article III forum, is free upon completion of trial to appeal and to seek a new trial before such an Article III forum — whatever the current prospects for delays or difficulties — on the ground that his supposed "waiver" was not free and voluntary. Petitioners occupy a precisely parallel position here, and they invoke the same right.



1. The distinction that the government draws between Appointment Clause objections and challenges to subject matter jurisdiction (Opp.Br. 16) is beside the point, because petitioners do not claim that Tax Court special trial judges lack subject matter jurisdiction. Objections to subject matter jurisdiction are indeed nonwaivable, but they are not the *only* sort of objection that cannot be waived, nor are they the sort of objection at issue here. Rather, petitioners object to trial and effective decision by an officer appointed in violation of the Appointments Clause. Petitioners invoke subject matter jurisdiction only by way of analogy, just as this Court did in *CFTC* v. *Schor* when it held a separation-of-powers claim to be nonwaivable. *See* 478 U.S. at 851 (when " 'the encroachment or aggrandizement of one branch at the expense of the other' . . . . is implicated in a given case, the parties cannot by consent cure the constitutional difficulty *for the same reason that* the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limits imposed by Article III, § 2.") (emphasis added).

2. The government intimates that *Morrison* v. *Olson*, 487 U.S. 654, 670-71 (1988), somehow held Appointments Clause claims to be waivable. (Opp.Br. 16-17). That decision did no such thing. The government's presentation of *Morrison* is egregiously misleading.

The government's indented quotation from *Morrison* is taken flagrantly out of context. *See* Opp.Br. 16. What this Court held to be "not 'jurisdictional' " and hence "waived" was *not*

defendant Olson's Appointments Clause argument — which the Court duly reviewed on the merits — but rather the *government's* (i.e., prosecutor Morrison's) failure to invoke in a timely fashion a narrow line of precedent that would have barred the defendant from raising his constitutional objections to his citation for contempt before the grand jury. *Morrison*, 487 U.S. at 669-70. That line of cases, beginning with *Blair* v. *United States*, 250 U.S. 273 (1919), relies solely on the special exigencies of the grand jury process to preclude a party held in contempt from disrupting the grand jury by challenging, *at that stage of the proceedings*, the subject matter jurisdiction of the grand jury or the constitutionality of the statute under which the grand jury investigation is being conducted. *See id.* at 282-83. Since prosecutor Morrison had failed to invoke *Blair* in the district court, the proceedings had already been disrupted and the special values served by *Blair* were no longer in issue and certainly insufficient to warrant ignoring the important Appointments Clause objection presented by defendant Olson. In this case, the special exigencies of grand juries have *never* been in issue and therefore the *Blair* rule discussed in *Morrison* has absolutely no bearing on whether petitioners' Appointments Clause claim can be deemed waived.

3. Finally, the government asserts that the Executive Branch itself will police the Appointments Clause, so waiver of such constitutional objections by any other party may be deemed preclusive by the courts without any concern that important separation-of-powers issues will go unresolved. Specifically, the government tries to distinguish *CFTC* v. *Schor* by arguing that "[t]he structural interests protected by the Appointments Clause," unlike the structural interests protected generally by the separation of powers, are ones "that at least one of the parties to every tax dispute (the United States) can be expected to protect." Opp.Br. 18.

This argument has a measure of facile appeal, but it cannot be taken seriously. The Appointments Clause claims resolved



by this Court in *Lamar* v. *United States* and *Morrison* v. *Olson* — that particular appointment mechanisms usurped the Executive appointment power — were raised by criminal defendants, *not* by the government party. In each case, the government party was more interested in preserving the fruits or promises of a particular criminal prosecution than in safeguarding the Constitution's structural integrity.[3]

When it comes to the separation of powers, this Court's guiding principle has always been, in essence, that foxes cannot be trusted to guard henhouses. This Court has never relied exclusively upon the other two branches of government to look after the Constitution's structural blueprints, even when the only apparent injury was to the prerogatives of one of those branches. Both Congress and the Executive have all too often been willing to sell their birthright for a mess of potage — to violate the separation of powers and relinquish certain powers or duties in order to meet some felt necessity or to deal with exigent circumstances. And this Court has consistently struck down such tinkering with the separation of powers even when the challenged device — for example, a one-house legislative veto, or the original Gramm-Rudman budget scheme — had been approved by both Congress and the President. *See INS* v. *Chadha*, 462 U.S. 919 (1983); *Bowsher* v. *Synar*, 478 U.S. 714 (1986). Indeed, the Appointments Clause itself was invoked by this Court to invalidate the Federal Election Campaign Act in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), over the objections of the

[3] Similarly, in this case the Appointments Clause question has been raised by petitioners rather than by the government. Indeed, the Solicitor General is willing to defend the appointment power of the Chief Judge of the Tax Court only if he can be deemed the "Head" of an *Executive* Department; the Tax Court, on the other hand, takes the petition that it can be given appointment power as if it were an Article III "Court of Law." See Pet. 6-7, 15-20. Petitioners are the only voice in this case for the appointment prerogatives that Article II, § 2 preserves for the Article III judiciary, which would be diluted if the Tax Court's appointment powers were to be sustained, as well as the only voice calling for a narrow and straightforward reading of the Constitution's text.

Executive and Legislative Branches that had collaborated on and enacted the law. Thus the Executive Branch cannot, any more than any other party, be relied upon to protect the "institutional interests" served by the Appointments Clause and the Constitution's other structural provisions. *CFTC* v. *Schor*, 478 U.S. at 851. "[N]otions of consent and waiver cannot be dispositive" when the Constitution's checks and balances are in issue. *Id.*

## CONCLUSION

In sum, petitioners' Appointments Clause objection has not been and should not be deemed waived; the Court should grant the petition for certiorari. The constitutional question has cast doubt on a major portion of the Tax Court's docket and generated a truly astounding degree of confusion within the Executive Branch itself over the constitutional status of the Tax Court and its special trial judges. In the alternative, the Court should issue the writ on the two questions presented in the petition *and additionally* on the third question presented by the govern-



ment: whether Appointments Clause objections are somehow different from other structural separation-of-powers questions that this Court has already held nonwaivable.

Respectfully submitted,

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